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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 256

CLOYCE HENRY PETERS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of Judge Johnsen (8 R. 33–68),[1] the concurring opinion of Judge Thomas (8 R. 68–69), and the dissenting opinion of Judge Riddick (8 R. 69–73) are reported at 160 F. 2d 858. The

[1] The record of the proceedings in the courts below is before this Court in its original form. It consists of seven volumes containing the stenographic transcript of the trial, to which we shall refer as "R."; one supplemental volume which contains the indictment, motions and orders of the district court, to which we shall refer as "S. R."; and one volume containing the proceedings in the circuit court of appeals, which is labelled "volume 8" and to which we shall refer as "8 R."

opinion of the court on petition for rehearing (8 R. 89–92) is not yet reported. The opinions are also printed as an appendix to the petition for a writ of certiorari (Pet. 18–63).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 3, 1947 (8 R. 74), and a petition for rehearing was denied June 13, 1947 (8 R. 93). On July 10, 1947, the time for filing a petition for a writ of certiorari was extended by the Chief Justice to August 13, 1947. The petition for a writ of certiorari was filed August 11, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether a person who without being under oath produces business records in compliance with an administrative subpoena obtains statutory immunity therefor.

2. Whether petitioner sustained the burden of proving that he specifically claimed his privilege against self-incrimination.

STATUTORY PROVISIONS INVOLVED

Section 301 of the Second War Powers Act, 56 Stat. 177, amending Section 2 (a) (4) of the Act

of June 28, 1940, 54 Stat. 676, (50 U. S. C. App., Supp. V, 633), provides in part as follows:

> For the purpose of obtaining any information, verifying any report required, or making any investigation pursuant to paragraph (3), the President may administer oaths and affirmations, and may require by subpena or otherwise the attendance and testimony of witnesses and the production of any books or records or any other documentary or physical evidence which may be relevant to the inquiry. Such attendance and testimony of witnesses and the production of such books, records, or other documentary or physical evidence may be required at any designated place from any State, Territory, or other place subject to the jurisdiction of the United States: *Provided,* That the production of a person's books, records, or other documentary evidence shall not be required at any place other than the place where such person resides or transacts business, if, prior to the return date specified in the subpena issued with respect thereto, such person furnishes the President with a true copy of such books, records, or other documentary evidence (certified by such person under oath to be a true and correct copy) or enters into a stipulation with the President as to the information contained in such books, records, or other documentary evidence. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. No person shall be

> excused from attending and testifying or from producing any books, records, or other documentary evidence or certified copies thereof or physical evidence in obedience to any such subpena, or in any action or proceeding which may be instituted under this subsection (a), on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be subject to prosecution and punishment or to any penalty or forfeiture or on account of any transaction, matter, or thing concerning which he is compelled to testify or produce evidence, documentary or otherwise, after having claimed his privilege against self-incrimination, except that any such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying. * * *

Section 202 of the Emergency Price Control Act, 56 Stat. 23 (50 U. S. C. App., Supp. V, 922), provides in part:

* * * * *

> (b) The Administrator is further authorized, by regulation or order, to require any person who is engaged in the business of dealing with any commodity, or who rents or offers for rent or acts as broker or agent for the rental of any housing accommodations, to furnish any such information under oath or affirmation or otherwise, to make and keep records and other docu-

ments, and to make reports, and he may require any such person to permit the inspection and copying of records and other documents, the inspection of inventories, and the inspection of defense-area housing accommodations. The Administrator may administer oaths and affirmations and may, whenever necessary, by subpena require any such person to appear and testify or to appear and produce documents, or both, at any designated place.

* * * * *

(g) No person shall be excused from complying with any requirements under this section because of his privilege against self-incrimination, but the immunity provisions of the Compulsory Testimony Act of February 11, 1893 (U. S. C., 1934 edition, title 49, sec. 46), shall apply with respect to any individual who specifically claims such privilege.

The Compulsory Testimony Act of 1893, 27 Stat. 443 (49 U. S. C. 46), provides:

No person shall be excused from attending and testifying or from producing books, papers, tariffs, contracts, agreements and documents before the Interstate Commerce Commission, or in obedience to the subpoena of the Commission, whether such subpoena be signed or issued by one or more Commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of the act of

Congress, entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, or of any amendment thereof on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him, may tend to criminate him or subject him to a penalty or forfeiture. But no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise, before said Commission, or in obedience to its subpoena, or the subpoena of either of them, or in any such case or proceeding: *Provided*, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying.

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry, or to produce books, papers, tariffs, contracts, agreements, and documents, if in his power to do so, in obedience to the subpoena or lawful requirement of the Commission shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by fine not less than one hundred dollars nor more than five thousand dollars, or by imprisonment for not more than one year or by both such fine and imprisonment.

The Act of June 30, 1906, 34 Stat. 798, c. 3920 (49 U. S. C. 48), provides as follows:

Under the immunity provisions in the Act entitled "An Act in relation to testimony before the Interstate Commerce Commission," and so forth, approved February eleventh, eighteen hundred and ninety-three, in section six of the Act entitled "An Act to establish the Department of Commerce and Labor," approved February fourteenth, nineteen hundred and three, and in the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineeen hundred and three, and in the Act entitled "An Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred and four, and for other purposes," approved February twenty-fifth, nineteen hundred and three, immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath.

STATEMENT

Petitioner and nine other persons, seven of whom were full-time officials of the Office of Price Administration, were indicted (S. R. 1–11) in the United States District Court for the District of Minnesota in one count charging that from April 1, 1943, to February 1, 1945, the defendants unlawfully conspired together to defraud the United States by corruptly administering and procuring the corrupt administration of regulations of the

Office of Price Administration relating to tires, in violation of Section 37 of the Criminal Code (18 U. S. C. 88). The indictment alleged that the conspiracy was executed in the following manner:

> * * * The defendants Harold J. Slawik and Carl W. Dokmo acting in their official capacities as officers of the Office of Price Administration would give to the defendants Peters and Munson written letters clothing them with apparent authority to act as deputy tire examiners; that Peters and Munson would call at various tire stations and release accumulated stocks for sale without examination, and they themselves would thereupon purchase such accumulated stock; that the defendant Walker would at various tire stations release tires without examination and thereupon arrange for the sale and shipment of the same to the defendant Peters; that the defendants Lechnyr and Norris, inspectors employed in the Central Truck Tire Inspection Station at 2180 University Avenue, St. Paul, Minnesota, would deliver to the defendants Peters and Reed used tires without having first made valid inspections of them; that the defendants Dokmo, Phelps, Hicks and Slawik permitted deliveries to Peters of used tires at the Central Truck Tire Inspection Station without requiring valid examinations of said tires, and that the said defendants during the time alleged in this indictment suppressed and suspended the

practice of valid examination of tires at the said Central Truck Tire Inspection Station.

Seven defendants went to trial.[2] Petitioner and three others were convicted, and petitioner was sentenced to two years' imprisonment and a fine of $10,000 (S. R. 50). The convicted defendants appealed to the Circuit Court of Appeals for the Eighth Circuit, urging contentions which ranged from the sufficiency of the evidence to errors in the admission of evidence at the trial and in the instructions to the jury. Petitioner urged, in addition, that he had obtained immunity from prosecution because he had submitted various books and records to inspection by an investigator of the Office of Price Administration.

The Circuit Court of Appeals affirmed the judgment as to each of the convicted defendants. Petitioner's claim of immunity was rejected by a majority of the court. However, the opinions of the judges of the court below are not altogether clear as to the grounds on which this conclusion was based. Judge Johnsen stated that petitioner had no immunity because the records in question had not been furnished under oath. Judge Thomas in a concurring opinion, apparently without disagreeing with Judge Johnsen, stated that "the point is covered by the required records doctrine", i. e., that the documents were records which were required by law to be kept and therefore that petitioner obtained no immunity by pro-

[2] Two pleaded guilty, and the Government dismissed the charge as to a third defendant who was a minor (see Pet. 19).

ducing them. Judge Riddick, dissenting, was of the view that the statute extended immunity even though the records might have been required by law to be kept and notwithstanding that there had been no oath.

In this Court, petitioner has abandoned all of his contentions in the lower court except the immunity claim. The pertinent, undisputed facts concerning this issue may be summarized as follows:

The Island Manufacturing Company is located at 2424 Minnehaha Avenue, Minneapolis, Minnesota (R. 2815). The firm is engaged in the business of manufacturing tire boots and reliners from scrap tires (R. 2815–2816). On October 28, 1943, Greta O. Peters, petitioner's wife, filed a trade-name certificate with the clerk of the District Court of Hennepin County, Minnesota, stating that she was the sole owner of the company (S. R. 121). The Nelson Tire Company is a separate concern which is engaged in the sale of tires in Minneapolis (R. 1210–1212). According to a trade-name certificate filed by petitioner, he is the sole owner of the firm (S. R. 122).[3]

On the afternoon of January 30, 1945, Hackett, an investigator of the Office of Price Administra-

[3] Petitioner's statement (Pet. 4) that "the record shows conclusively that the petitioner was in fact the owner and manager and operator of both firms" is not supported by record references and is inconsistent with his claim in the district court that while he was the owner of the Nelson Tire Company, he was only the manager of the Island Manufacturing Company (R. 1861; see also, R. 1324–1325).

tion who had been investigating irregularities in the local office of the O. P. A., called on petitioner at his office at the Island Manufacturing Company, accompanied by one Venie, another O. P. A. investigator.[4] After having identified himself, Hackett handed to petitioner two subpoenas. One was directed to "Greta P. Peters d. b. a. Island Manufacturing Company," and the other was directed to "Greta O. Peters and Cloyce Henry Peters doing business as Nelson Tire Company" (Def. Exs. OO–1 and OO–2; R. 1751–1753). The subpoenas were identical in form. The one relating to the Island Manufacturing Company was in the following terms:[5]

UNITED STATES OF AMERICA

OFFICE OF PRICE ADMINISTRATION

Subpoena Duces Tecum

To: Greta P. Peters d. b. a. Island Manufacturing Company
2424 Hennepin Avenue
Minneapolis, Minnesota.

At the instance of the Price Administrator, Office of Price Administration, you are hereby required to appear before William J. Hackett, Special Representative, of the Office of Price Administration, at 2424 Hennepin Avenue, Minneapolis, Minnesota,

[4] Petitioner's bookkeeper, Keller, was also present at the time (R. 1564–1565).

[5] These exhibits have not been incorporated in the record; the text which we quote is from a copy contained in the files of the Department of Justice. No question is raised as to its authenticity or accuracy.

on the 30th day of January, 1945, at 12 o'clock M. of that day, to testify concerning the operations and business transactions of the Island Manufacturing Company during the period January 1, 1943 to January 29, 1945.

And you are hereby required to bring with you and produce at said time and place the following documents: All business records of the Island Manufacturing Company from January 1, 1943 to January 29, 1945, including ledgers, journals, check books, cancelled checks, bank statements, stock books, inventory records and all other books and records, bills of lading, purchase invoices, sales, invoices, delivery tickets and receipts, receipts and records showing cash paid out, and copies of all correspondence to or from your sellers and buyers.

Fail not at your peril.

In witness whereof, the undersigned Price Administrator of the Office of Price Administration, has hereunto set his hand at Saint Paul, Minnesota, this 30th day of January, 1945. CHESTER BOWLES,
Price Administrator.

By H. J. Slawik,
HAROLD J. SLAWIK,
Acting District Director, Twin Cities District Office, Office of Price Administration.

Notice to Witness: If claim is made for witness fee or mileage, this subpoena should accompany voucher.

Petitioner advised Hackett that the requested records were scattered; that some were at his home, some at his attorney's office, and others at his auditor's office, but that he would gather them together and have them available for inspection at the accountant's office on the following morning (R. 1596). This was acceptable to Hackett, and he then interrogated petitioner concerning one phase of the transactions under investigation (R. 1596–1597). Petitioner readily answered the questions (R. 1552–1553, 1565, 1597), and showed the investigators through the plant (R. 1597).

On the following morning, petitioner met the investigators at the office of his accountant and made available to them various books and records (R. 1598).[6] He assisted the investigators in locating documents (R. 1554, 1601), and he readily answered all questions which were asked of him (R. 1598–1599). The investigators took possession of some documents at this time (R. 1560, 1755–1756). They were unable to locate certain

[6] No inventory was ever made of the various documents and records which were produced by petitioner. The great bulk of the records were those of the Island Manufacturing Company. The court below was able to trace only two documents to the Nelson Tire Company. These were Government Exhibits 41–A and 41–B, which are cancelled checks of the Nelson firm made payable to cash and issued in payment for recapping work done. The checks bore the indorsement of the defendant Dokmo. (R. 1219–1221.) The petition for a writ of certiorari likewise identifies only these two checks as from the records of the Nelson Tire Company (Pet. 5).

records at the auditor's office and arrangements were made with petitioner to resume the investigation at the office of the Island Manufacturing Company that afternoon (R. 1603).

The two O. P. A. investigators met with petitioner, his attorney and his bookkeeper at the appointed time (R. 1555, 1568, 1644), and petitioner furnished additional records and information pertinent to the investigation (R. 1555–1558). Without any legal compulsion, petitioner's attorney also furnished documentary information from his files (R. 1556, 1644–1646).

It is undisputed that at no time was an oath administered to petitioner (R. 1830). Similarly, no subpoena was ever directed to petitioner in respect of the records of the Island Manufacturing Company; the subpoena concerning the records of Island was addressed only to petitioner's wife (supra, pp. 11–12).

The disputed factual issue relates to whether petitioner specifically claimed his privilege against self-incrimination. Hackett, the O. P. A. investigator, testified that petitioner never claimed immunity in respect of any document which he submitted to inspection (R. 1661). On the other hand, petitioner testified that as soon as the subpoenas were handed to him on January 30, 1945, he telephoned Mr. Smilow, his attorney, and that at the conclusion of the conversation, "I hung up the phone and I said, 'Mr. Smilow advised me that if you have subpoenas, the only thing I can do is

furnish you with the books and records that you ask for. But he told me not to waive any rights' " (R. 2877). According to petitioner's testimony, Hackett said nothing when he made this statement (R. 2878). In connection with this incident, Hackett testified as follows on cross-examination by petitioner's counsel (R. 1754–1755):

> Q. Now I will ask you, Mr. Hackett, if at the time you showed these papers to and handed them to Mr. Peters did he not call Mr. Smilow, his attorney, on the telephone in your presence?
>
> A. I don't remember that he did, no, sir.
>
> Q. And did he not tell him that there was a representative there serving a subpoena on him, a representative of the United States Government?
>
> A. I don't remember that he did.
>
> Q. You would not say that that did not occur?
>
> A. No, sir, I would not.

At another point in the cross-examination, Hackett testified (R. 1768):

> Q. But you had by reason of a telephone conversation that occurred the day before known that he had an attorney?
>
> A. No, sir.
>
> Q. Did I not understand you to say that when you presented him with a subpoena he called his attorney?
>
> A. No, sir, you did not. Or, I won't say—you may have misunderstood me, but I did not say that.

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Q. I believe what you said is that you would not say that that did not occur?

A. That is correct.

There was no other evidence on this issue. Neither petitioner's attorney nor his bookkeeper testified; and at the point in the trial when investigator Venie testified, the question of immunity had not yet been raised.

ARGUMENT

1. Two subpoenas were handed to petitioner by investigator Hackett. One was directed to petitioner's wife, specifically naming her, and related to the books and records of the Island Manufacturing Company. The other related to the books and records of the Nelson Tire Company and was directed to petitioner as well as his wife. We do not understand petitioner to contend that the subpoena addressed to his wife imposed any legal compulsion on him to produce the documents sought. But the dissenting judge below apparently was of this view (see Pet. 57–58), on the theory that petitioner was the actual owner of the Island Manufacturing Company, notwithstanding that his wife had filed with the clerk of the local court a trade-name certificate stating that she was the sole owner.[7] It may be assumed, *arguendo,*

[7] The dissenting judge states (Pet. 57) that "the subpoenas were addressed to the Nelson Tire Company and the Island Manufacturing Company." But we are unable to find any basis for this in the record, and petitioner does not so claim (see Pet. 4). As has been shown in the Statement, *supra,*

that petitioner was the owner, but this does not alter the fact that no subpoena was directed to him in respect of any books or records of the Island Manufacturing Company which may have been in his possession. Whatever may have been Hackett's reason for serving the subpoena on petitioner rather than on his wife, the subpoena could impose no duty on petitioner. He was a stranger to it. The subpoena imposed a duty only upon petitioner's wife, and she asserts no claim of immunity here. So far as petitioner is concerned, he was a volunteer who produced books and records not in response to a subpoena directed to him and not under oath. In this aspect of the case, his status is no different from that of the defendant in *Sherwin* v. *United States,* 268 U. S. 369, where this Court rejected a claim of immunity because, while the defendant, upon demand, gave an investigator of the Federal Trade Commission access to his books and papers, he did not act in obedience to a subpoena directed to him. See also *Shaw* v. *United States,* 131 F. 2d 476, 480–481 (C. C. A. 9).

2. The second subpoena with respect to the books of the Nelson firm was directed to petitioner and did impose a duty on him. So far as the

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p. 11, defendant's exhibit 00–1 was addressed to "Greta O. Peters and Cloyce Henry Peters, doing business as Nelson Tire Company, 24 East Hennepin, Minneapolis, Minnesota," and defendant's exhibit 00–2 was directed to "Greta P. Peters d. b. a. Island Manufacturing Company, 2424 Hennepin Avenue, Minneapolis, Minnesota."

record reveals, the only records of the Nelson firm which petitioner produced in response to the subpoena were two cancelled checks (see fn. 6, *supra,* p. 13). But there was no hearing of any kind, unless petitioner's informal conversations with investigator Hackett may be termed such. Petitioner did not testify under oath, nor did he produce the two cancelled checks under oath. The decisive question is whether the production of the checks without the testimonial trustworthiness of an oath entitled petitioner to statutory immunity. And we believe it to be clear that both the subpoena and the oath are essential prerequisites to the claim of immunity.

A subpoena commands a person to appear at a given time and place with such documents as are enumerated in it. It does not, however, compel him to surrender the documents or to give oral information unless he is first sworn as a witness. See, for example, the procedure in *Wilson* v. *United States,* 221 U. S. 361, 368, where Wilson appeared before a grand jury in response to a subpoena and stated his purpose but declined to answer any questions until he was sworn. And in this connection it cannot be said that the oath is an unnecessary formality to which no legal significance should attach. For what Congress has sought wherever it has exchanged immunity for privileged information is not informal talk or unverified documentary evidence. The ordinary testimonial safeguard of an oath constitutes posi-

tive assurance to the Government that, in return for immunity, it is receiving truthful information.

In the absence of an oath, false testimony could be given with impunity. Yet the statute in this case and the immunity statutes generally assume the necessity for an oath and provide that the immunity which is extended does not reach a prosecution for perjury committed in testifying in response to an administrative subpoena. And where no such specific provision exists, this Court has said that the immunity still does not extend to a perjury prosecution, for "the reservation of the right to prosecute for perjury made in the statutes to which we have referred was but the manifestation of abundant caution, and hence the absence of such reservation in the statute under consideration may not be taken as indicative of an intention on the part of Congress that perjury might be committed at pleasure." *Glickstein* v. *United States,* 222 U. S. 139, 143–144.

But there is even clearer evidence that Congress was exchanging immunity only for testimony under oath and the production of documents under oath. As the opinion of Judge Johnsen, in the court below, persuasively demonstrates, Congress itself has explicitly defined the right of immunity which it granted.[8] In March

[8] The history of this legislation is set forth extensively in the dissenting opinion of Mr. Justice Frankfurter in *United States* v. *Monia,* 317 U. S. 424, 435–438.

1906 Judge Humphrey of the District Court for the Northern District of Illinois held that the Compulsory Testimony Act extended immunity to corporate officers for furnishing, on the Government's request, oral or documentary information, notwithstanding that it was furnished without the compulsion of a subpoena and without the trustworthiness of an oath. *United States* v. *Armour & Co.,* 142 Fed. 808. In respect of the requirement of an oath, the court said (142 Fed. at 825–826):

> * * * And I am also of opinion that under any of these acts in question, these immunity laws, the production of books and papers would be legal evidence without the oath of any person, when they are adduced as showing admissions against interest and against the party producing them.
>
> Upon the authority in the cases of *Bram* v. U. S., 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, and *Boyd* v. *U. S.,* 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, legal compulsion does not depend upon subpoena or oath, and upon reason this must be so. Books and documents prove themselves, when produced for the purpose of showing admissions against interest. * * *
>
> Books and papers produced by these defendants as the books and records of their business, and called for as such, are evidence against them, without any oath. If I am right in the proposition that the immunities given by the act are as broad as the liabilities

imposed by the act, then the subpoena and the oath were not essential. Garfield could make a legal requirement without using either the subpoena or the oath. I think this is clear from the language of the act. * * *

* * * The purpose of the oath was to secure the truth. That is always the purpose of the oath. That is the only purpose of the oath; and, to be certain that we get the truth, the court always starts out by putting the witness under oath. But the act under which Garfield was clothed with power did not require him to put anybody under oath. It required him to make investigation. He might make it according to legal forms or not. He might use any kind of evidence that he chose that was suitable to his purpose. The evidence procured from these defendants, so far as it consisted of books and papers, was, however, legal evidence—would be considered legal evidence in a court of law; and under any one of these acts the production of the books and papers is a complete compliance with the law providing for the production of evidence, documentary or otherwise. It is not strange that Garfield was satisfied not to swear the defendants, although he started out with that intention. He distinctly told them so, and his forms show that fact. He expected to put them on oath if he regarded it as necessary, if he had any doubt about the truthfulness of the evidence. He had ac-

> cess to the books of original entry. He was satisfied of that fact. His agents were satisfied of that fact. The record shows this over and over again by repeated answers, and there was not the slightest reason for putting anybody under oath, so far as the use of those books and documents was concerned. The oath of any one would have made that evidence no stronger or better than it is now without the oath.

The decision was immediately and severely criticized as an unwarranted construction of the Compulsory Testimony Act, and within one month, President Theodore Roosevelt called upon Congress "to enact a law declaring the true construction of the existing legislation so far as it affects immunity," because the district court's interpretation of the law "comes measurably near making the law a farce." H. Doc. No. 706, 59th Cong., 1st sess., pp. 2, 3.

Within approximately three months of the *Armour* decision, Congress enacted the Act of June 30, 1906, 34 Stat. 798, which by its title was "An Act defining the right of immunity of witnesses" under all of the then effective immunity statutes. The statute provided that under the immunity provisions of the various specified immunity statutes—

> * * * immunity shall extend only to a natural person who, in obedience to a subpoena, gives testimony under oath or pro-

duces evidence, documentary or otherwise, under oath.

Thus, the identical issue presented by this case was squarely presented to all three branches of the Government more than forty years ago. The district court adopted the view which petitioner here urges, and the Attorney General and the President immediately sought legislation to remove the possibility of a similar judicial error in the future. Congress responded by enacting declaratory legislation in clear, explicit terms. In the words of Judge Johnsen (see Pet. 38) in the court below—

> Congressional intention could hardly have been made more definitely to appear. From the legislative history and the language used in the title and the body of Public Law No. 389, the purpose of the Act plainly was to express the legislative concept of the scope of the immunity provisions of the Compulsory Testimony Act of February 11, 1893, in order to eliminate the possibility of any further misconstruction or extension such as had been made in the Armour case. There was no attempt to change the language of the statute in any way; a declaration was simply made of what Congress believed that the immunity provisions in the Compulsory Testimony Act had always meant and implied. A court could not thereafter regard the language of the Act as having any greater implication, and it

certainly would have no basis or excuse to repeat the misconstruction made in the Armour case.

We think it matters little whether petitioner's claim to immunity is founded on the Compulsory Testimony Act, as he urged in the district court and in the Circuit Court of Appeals, or on the immunity provisions of the Second War Powers Act, as he urged on petition for rehearing in the Circuit Court of Appeals, and as he urges in this Court.[9] The meaning and effect of the statutes is substantially the same, and there plainly was no Congressional purpose to grant greater immunity in one than the other.

The Act of June 30, 1906, was declaratory in purpose, merely making explicit that which Con-

[9] The Office of Price Administration exercised rationing controls pursuant to the power conferred on the President by the Second War Powers Act to allocate scarce commodities (see Pet. 10–11), and its price control authority derived from the Emergency Price Control Act. Both statutes authorized the issuance of subpoenas and contained immunity provisions. *Supra*, pp. 3–5. The subpoenas could have been issued pursuant to either of the statutes since both price and rationing controls existed in respect of tires. Ration Order No. 1–A, 7 F. R. 9160; Revised Maximum Price Regulation 528, 10 F. R. 2726; Revised Price Schedule 87, 7 F. R. 4781. The Circuit Court of Appeals accepted petitioner's then position that the provisions of the Emergency Price Control Act applied. But on petition for rehearing, petitioner urged for the first time that the Second War Powers Act is the applicable statute, and he so urges in this Court. In the view we take of the case, the considerations are the same regardless of which statute is controlling.

gress and the President regarded as implicit in the Compulsory Testimony Act and the other existing immunity statutes. The 1906 Act added no new words to such provisions; it provided only that immunity thereunder should extend only where the witness is a natural person and has been subpoenaed and has testified or produced documents under oath. Accordingly, no significance can attach to the fact that Section 2 (a) (4) of the Second War Powers Act, *supra*, pp. 3–4, does not repeat the terms of the 1906 declaratory amendment *in haec verba*. The decisive fact is that Section 2 (a) (4) does contain the substance of the Compulsory Testimony Act of 1893, under which no immunity arises for the production of documents not given under oath.

So far as we have been able to ascertain, no court since 1906 has suggested that the subpoena and the oath do not condition the exchange of immunity. Neither petitioner nor the dissenting judge below suggest any valid reason why, after more than forty years, and after Congress has definitively declared the meaning of its legislation, there should be a return to the thoroughly repudiated *Armour* decision.

3. Both the Emergency Price Control Act and the Second War Powers Act (*supra*, pp. 4–5) provide that the witness must specifically claim his privilege against self-incrimination as a condition precedent to the flow of immunity. To

successfully assert immunity as a plea in bar to the prosecution, it was petitioner's burden in the district court to establish that he claimed his privilege. *United States* v. *Heike,* 175 Fed. 852 (S. D. N. Y.), appeal dismissed, 217 U. S. 423. The trial court, in denying petitioner's claim of immunity, did not specify the grounds of its ruling. We contend that petitioner was not entitled to immunity unless he could show, by clear and convincing evidence, that he had specifically claimed his privilege before yielding the documents; and that the evidence adduced by petitioner on this issue at the trial was too vague and unpersuasive to have supported any finding that he had specifically claimed the privilege.

Petitioner did not file a plea in bar prior to trial to seek a determination of the immunity question. The trial commenced on April 25, 1945, and the matter of immunity was not raised until May 11 (R. 1650–1651); and even then, when the Government inquired of the witness Hackett whether petitioner had claimed immunity, petitioner's counsel objected on the ground that petitioner was not required to make any such claim (R. 1660–1661). At the close of the Government's case a few days later, petitioner filed an unsuccessful motion to dismiss on the ground that he was immune from prosecution (R. 1859–1863). The motion did not even suggest that petitioner

had claimed his privilege when he produced the documents before Hackett, the O. P. A. inspector. As is shown in the Statement, supra, p. 15, Hackett had testified that petitioner never had asserted a claim of immunity, and he denied any recollection that petitioner had telephoned his attorney or made any general statement that he would not waive any of his rights when the subpoenas were served upon him. In the course of his testimony, petitioner touched on the question whether he claimed immunity only to the extent that he disputed Hackett's testimony and testified that he telephoned his attorney after the subpoenas were handed to him on January 30, 1945, and then told Hackett that his attorney told him "not to waive any rights" (R. 2877). Petitioner adduced no other testimony on the issue. Neither the attorney whom he claimed to have telephoned nor his bookkeeper who was present at the time was produced as a witness.

There is no dispute on the basis of the evidence adduced at the trial that petitioner cooperated with Hackett in every way. During the three conferences on January 30 and 31, he answered his questions, he produced documents, and he even assisted Hackett in locating documents which he could not find. Smilow, his attorney, furnished Hackett with at least one document from his files and discussed various aspects of the investigation with Hackett. There is no evidence

that, at any time after the first disputed statement by petitioner that his attorney told him not to waive any of his rights, petitioner ever asserted a claim to immunity. Even when his attorney was present at the third conference on January 31, nothing was said concerning immunity. Instead, throughout the investigation it apparently was petitioner's strategy to cooperate in every respect with Hackett in an effort to convince him of his innocence and of the guilt of the O. P. A. officials.

On the basis of this record, we doubt whether the evidence would substantiate any finding that petitioner claimed his privilege against self-incrimination or any "right" at all. And even assuming that he made the casual statement to Hackett that his attorney told him not to waive any of his rights, this was not a specific claim of the privilege. It did not apprise the investigator that if he compelled the disclosure, he would be relieving petitioner, the hub of the conspiracy, of criminal liability. Everything which happened thereafter—petitioner's willing disclosure of incriminating oral information, his assistance to the investigators, the failure of his attorney to claim immunity for him, the effort to avoid inquiry at the trial on this issue—supports the view that petitioner did not have in mind the constitutional privilege when he made the statement, assuming he made it at all.

4. As a basis for urging that his petition for a writ of certiorari should be granted, petitioner argues (Pet. 15–17) that this case involves the question which is presently before the Court in *Shapiro* v. *United States,* No. 49, and *United States* v. *Hoffman,* No. 97, i. e., whether one who produces in response to a subpoena records which are required by law to be kept obtains statutory immunity in exchange. As we have shown, fn. 6, *supra,* p. 13, however, the only documents which petitioner produced in response to a subpoena addressed to him were two cancelled checks of the Nelson Tire Company made out to "cash," which, it was claimed, were issued in payment for recapping work on usable tires, but which bore the indorsement of the defendant Dokmo. The petition states (Pet. 5) that these "were not required documents to be kept under the rules and regulations of the Office of Price Administration relating to the rationing of tires." On its own statement, therefore, the petition does not raise the questions involved in the *Shapiro* and *Hoffman* cases as to the so-called "required records" doctrine.

CONCLUSION

The court below determined that "the evidence is utterly conclusive of appellant's guilt. He was the hub of the conspiracy, and the other defendants were largely spokes." Petitioner has not disputed this conclusion. For the reasons set

forth, we respectfully submit that his claim to immunity is unfounded and that the petition for a writ of certiorari should be denied.

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